

Message Text

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ORIGIN EB-07

INFO OCT-01 IO-10 ISO-00 L-03 JUSE-00 SSO-00 NSCE-00

USIE-00 INRE-00 AGR-05 CEA-01 CIAE-00 COME-00 DODE-00

FRB-03 H-02 INR-07 INT-05 LAB-04 NSAE-00 NSC-05 PA-01

AID-05 CIEP-01 SS-15 STR-04 TAR-01 TRSE-00 PRS-01

SP-02 OMB-01 FEA-01 FTC-01 AF-06 ARA-06 EA-07 EUR-12

NEA-10 /127 R

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FM SECSTATE WASHDC

TO USMISSION GENEVA IMMEDIATE

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E.O. 11652: N/A

TAGS: UNCTAD, ETRD, ECON

SUBJECT:

FOR USDEL - UNCTAD GROUP OF EXPERTS ON RESTRICTIVE
BUSINESS PRACTICES - DELIVER BY 9 AM, OCTOBER 24

REF: GENEVA 8036

1. OUR INITIAL COMMENTS RELATE TO PREAMBLE ON "INTRODUC-
TORY PARAGRAPH" WHICH IS REFERRED TO IN PARAGRAPH (3) OF
REFTEL. PREAMBLE OR SOME OTHER PART OF TEXT MUST CLEARLY
INDICATE WHICH PRACTICES IN LIST OF RBPS ARE TO BE GOVERNED
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BY RULE OF REASON. WE CANNOT REPEAT CANNOT ACCEPT STATE-

MENT WHICH LEAVES IT UP TO EACH COUNTRY TO DETERMINE WHETHER RULE OF REASON APPLIES TO A PARTICULAR PRACTICE OR WHETHER PRACTICE IS TO BE PER SE ILLEGAL. MOST PRACTICES LISTED SHOULD BE SUBJECT TO RULE OF REASON TEST. USDEL MUST OPPOSE RESOLUTION IF ABOVE CONCEPT NOT INCORPORATED IN RESOLUTION.

2. WHILE WE ARE PLEASED TO SEE THAT STATEMENT COVERS BOTH PRIVATE AND PUBLIC ENTERPRISES, THESE PRACTICES APPEAR NOT

TO BE CLEARLY CONDEMNED WHEN ENGAGED IN BY GOVERNMENTS. AT VERY LEAST, USDEL MUST MAKE STATEMENT (AND GATHER AS MUCH GROUP B SUPPORT AS POSSIBLE) THAT WHENEVER, UNDER A COUNTRY'S LAW, FOREIGN GOVERNMENTS ARE CONSIDERED TO BE SUBJECT TO THAT COUNTRY'S NATIONAL ANTITRUST LAW, THEN SUCH COUNTRY SHOULD CONSIDER THE LIST OF RBPS TO APPLY TO GOVERNMENTS ENGAGED IN THESE PRACTICES.

3. WE SHARE CONCERN THAT LIST OF RBPS MAY BE USED IN FASHION ADVERSE TO U.S. INTERESTS. IN THIS LIGHT, AND TO LIMIT POSSIBLE DAMAGE, USDEL SHOULD INSIST THAT PREAMBLE (WHICH PRESUMABLY HELPS EXPLAIN OPERATIVE PART OF DOCUMENT) SHOULD BE JOINED TO OPERATIVE PART WHENEVER LATTER PART IS CIRCULATED OR REFERRED TO IN UN CONTEXT. ALSO, USDEL MUST OBJECT TO AND NOT SUPPORT THOSE PROVISIONS IN LIST OF RBPS WHICH DO NOT HAVE UNANIMOUS SUPPORT OF FULL U.S. DELEGATION.

4. FOLLOWING ARE OUR SPECIFIC COMMENTS AND REVISIONS WHICH SHOULD BE PROPOSED BY USDEL KEYED TO LIST OF RBPS IN PARAGRAPH 2 OF REFTL:

(1) INTERNATIONAL CARTELS:

-- IN FIRST PLACE WE BELIEVE CARTEL SHOULD BE DEFINED CLEARLY TO APPLY TO ARRANGEMENTS BETWEEN SUBSTANTIAL COMPETITORS TO ENGAGE IN RESTRICTIVE PRACTICES IN IMPORTANT MARKETS.

-- (A) WE BELIEVE THAT THIS SUBPARAGRAPH IS TOO BROAD LIMITED OFFICIAL USE

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IN ITS PRESENT WORDING AND COULD COVER LEGITIMATE BUSINESS ARRANGEMENTS. WE PROPOSE FOLLOWING WORDING: "AGREEMENTS FIXING THE PRICE OF EXPORTS AND IMPORTS."

-- (C) THIS SUBPARAGRAPH MIGHT BE SUBJECT TO RULE OF REASON JUSTIFICATIONS WITHOUT STRONG DEFINITION OF CARTEL AS PROPOSED ABOVE.

-- (E) SAME COMMENT APPLIES TO THIS SUBPARAGRAPH AS SUBPARAGRAPH (C) ABOVE.

(2) NATIONAL EXTERNAL CARTELS:

-- AS A GENERAL OBSERVATION, WE ARE PUZZLED BY THE CONTRADICTION BETWEEN LISTING NATIONAL EXTERNAL CARTELS AS A SERIES OF RESTRICTIVE PRACTICES AND THEN SAYING IN PARAGRAPH 3(A) OF REFTEL THAT EXPORT CARTELS MAY BE EXEMPTED BY SOME STATES. FURTHER, WE BELIEVE "CARTEL" SHOULD BE DEFINED AS IN (1) ABOVE.

-- (A) SAME COMMENT AS (1) (A).

-- (C) SAME COMMENT AS (1) (C).

-- (E) SAME COMMENT AS (1) (E).

(3) DOMESTIC RESTRICTIVE PRACTICES:

-- (A) WE HAVE SAME GENERAL OBSERVATION REGARDING "RESALE PRICE MAINTENANCE" AS WE HAVE MADE CONCERNING "NATIONAL EXTERNAL CARTELS." ALSO WE HAVE TROUBLE WITH INCLUSION OF THE TERM "REBATE" IN SUBPARAGRAPH (A) SINCE IN CERTAIN CIRCUMSTANCES "REBATES" MAY BE PRO-COMPETITIVE (E.G., REBATES ON NEW CAR SALES IN U.S.).

-- (B) THIS PARAGRAPH IS UNCLEAR. DOES IT MEAN COLLECTIVE BOYCOTT ENGAGED IN BY DEALERS AGAINST CUSTOMERS, OR COLLECTIVE BOYCOTT BY CUSTOMERS AGAINST DEALERS? IN ANY EVENT, WHY ARE NOT CUSTOMERS ALSO INCLUDED IN THIS SUBPARAGRAPH?

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(4) ACQUISITION OF OR ABUSE OF A DOMINANT POSITION OR ACTS OF UNFAIR COMPETITION.

-- (B) WE UNDERSTAND "UNNECESSARY" HAS BEEN ADDED AS QUALIFICATION TO "TIED SALES OR PURCHASES."

-- (C) RATHER THAN "DISCRIMINATORY PRICING", WE PREFER "UNREASONABLY DIFFERENTIATED PRICING."

-- (D) USDEL SHOULD STATE THAT THIS SUBPARAGRAPH WOULD NOT BE ACCEPTABLE IF INTENDED TO FORECLOSE FIRM WITH SIGNIFICANT MARKET POWER FROM EVER MAKING TOE-HOLD ACQUISITION, ESPECIALLY IN NEW MARKET.

-- (E) WE UNDERSTAND THIS SUBPARAGRAPH HAS BEEN

DELETED ENTIRELY AND STRONGLY FAVOR THIS.

5. WITH REFERENCE TO OUR COMMENTS ABOUT NEED FOR A DEFINITION OF CARTEL, WE HAVE THE FURTHER OBSERVATION. TO THE EXTENT THAT THESE PRACTICES ARE GOVERNED BY RULE OF REASON STANDARDS, IT IS NOT NECESSARY TO TIE THEM TO CARTEL BEHAVIOR STRONGLY DEFINED.

6. IN CONCLUSION, USDEL SHOULD STATE THAT WE REGARD EXERCISE AS PRELIMINARY IN CHARACTER RATHER THAN FINAL "ALL-INCLUSIVE LIST OF PRACTICES" AND THE LIST OF PRACTICES AS HAVING BEEN PREPARED BY EXPERTS WHICH IS NOT BINDING ON GOVERNMENTS. INGERSOLL

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